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**IN THE COURT OF
APPEAL
AT NAIROBI**

**CORAM: (MWERA, MURGOR, J. MOHAMMED, JJA) CIVIL
APPLICATION NO. SUP. 15 OF 2014**

BETWEEN

SILAS MUTHURI MUGAMBI.....APPLICANT

AND

PAN AFRICA LIFE ASSURANCE LTD.....RESPONDENT

(Being an application for leave and on the basis of this general public importance are involved in the intended appeal to the Supreme Court against the decision and orders of the Court of Appeal (Karanja, Warsame, Musinga, JJA) delivered on 13th June 2014 in Civil Appeal No. Nai 143 of 2013)

RULING OF THE COURT

This Notice of Motion dated 11th July 2014 is made under **Article 163(4) (b)** of *the Constitution* following a decision of this Court (*Karanja, Warsame, Musinga, JJA*), in **Civil Appeal No Nai 143 of 2014** delivered on 13th June 2014 which upheld Githinji, JA sitting as a single judge in an application to extend time to appeal under **rule 4** of the **Court of Appeal Rules** and, where the applicant seeks for certification to appeal against the decision of the full Court to the Supreme Court.

Briefly, by way of a Plaintiff the applicant claimed special damages of an amount of Kshs.5,609,356 from the respondent for unpaid commissions for unlawful termination of his contracts. The applicant had on 7th November 1990 entered into a contract with the respondent for the sale of insurance packages to members of the public. A second contract was entered into on 22nd January 1999 which was terminated by the respondent on 3rd July 2000, when the applicant failed to reach the stipulated sales targets. He was reinstated again on 21st August 2000. A third contract was dated 18th February 2005, which was subsequently terminated on 27th October 2005 again, due to his failure to achieve the sales targets.

In his ruling the learned judge Havelock J, dismissed the applicant's case having found that it had not been proved, as the claim for special damages was unfounded.

Being aggrieved by the decision of the lower court the applicant sought to appeal to this Court. The applicant filed a Notice of Appeal on 27th March 2012, but when he failed to file a Memorandum of Appeal or a record of Appeal within the stipulated period, he sought leave to file the appeal out of time under **rule 4** of this Court's rules. The application was dismissed by Githinji, JA for reasons that the delay of sixteen months in filing the appeal was inordinate.

Being further aggrieved by the decision of the single judge the applicant filed a reference to the full Court. In their decision, the full Court found that the learned single judge had exercised his unfettered discretion judiciously as, the applicant had not advanced any sufficient reason for the inordinate delay in filing the application. The Court further observed that, the inability to pay fees did not arise as, the applicant was aware of the provisions of the law which allowed the filing of a Memorandum of Appeal without the need to pay legal fees, having benefitted from a similar application in the High Court.

Still aggrieved, the applicant has now sought to challenge the decision of the full Court in the Supreme Court on grounds that:

- i. *The matter is of great public importance.*
- ii. *The applicant made an application to the granted leave to appeal out of time.*
- iii. *On 13th June 2014 Hon. Lady W.Karanja, Hon. M. Warsame, Hon. E.K. Musinga delivered a ruling dismissing the applicant's reference with no order as to costs.*

In his submission, in Kiswahili the applicant who appeared in person contended that he would rely on the Notice of Motion dated 11th July 2014 together with his supporting affidavit of even date. He urged the Court to certify his application to the Supreme Court so that the time for the filing of his appeal could be enlarged, which would in turn enable him to ventilate his claim for special damages in this Court.

Mr. Rambo, learned counsel for the respondent opposed the application, and argued that the applicant's application should not be certified since it was not of general public importance; that the application was with respect to a private claim by an individual and there was nothing that the public stood to gain from the appeal. Counsel cited the Supreme Court decision of **Malcom Bell vs Hon. Daniel Toroitich Arap Moi & another [2013] eKLR** which provided guidelines on the prerequisites for a finding of general public importance.

In his reply, the applicant, argued that many people would benefit from a decision that was made in his favour in this case.

In determining this matter, we must be guided by the strictures that have been laid down by the Supreme Court in the case of **Malcom Bell vs Daniel Toroitich Arap Moi (supra)** where it was stated thus,

i) for a case to be certified as one involving a matter of general public importance, the intended appellant must satisfy the Court that the issue to be canvassed is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have significant bearing on the public interest;

iii) such question or questions of law must have arisen in the court or courts below, and must been the subject of judicial determination;

iv) Where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of

Appeal for its determination;

v) Mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4)(b) of the Constitution;

vi) The intending applicant has an obligation to identify and concisely set out the specific elements of ‘general public importance’ which he or she attributes to the matter for which certification is sought;

vii) Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

In applying the aforementioned principles we will begin by asking whether the applicant has raised any substantial issue of law, and whether such issue is of general public importance. The instant application arises out of the decision of a full bench of this Court upholding the decision of Githinji, JA which dismissed the applicant’s application for extension of time to file an appeal. It is this ruling that the applicant seeks to appeal against in the Supreme Court. Yet, we were not told which issue in respect of the reference would transcend the circumstances of his case, neither were we told which question of law had arisen from the reference, and was the subject of judicial determination.

Another pertinent question we must ask is whether the applicant identified, and concisely set out the specific elements of ‘general public importance’. The applicant did not either in the record or his submissions to us specify the elements of “general public importance” for which the certification was sought. No reason was advanced to state what issue of general public importance had arisen from the decision of the full bench.

We must add that, we were not shown how a state of uncertainty had come into existence following the decision of the full court on the application for extension of time, and for which, a Supreme Court determination was required. We take the view, that the long line of cases see ***John Onger Mariaria & Others vs. Paul Matundura (C.Appl. No. NAI.301/03) (ur)***, ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (C.Appl. No. NAI. 251/97 (ur)*** and ***Murai vs. Wainaina (No.4) [1982] KLR 38*** that set out the guidelines and principles on the exercise of discretion by a single judge, are well settled, and there is no uncertainty that has arisen in this area of the law to warrant the Supreme Court’s attention.

Moreover, when we consider the substance or subject matter of the appeal sought, the applicant seeks to prosecute his appeal on a claim for special damages for breach of an insurance contract that was dismissed by the High Court. It is noteworthy that the Supreme Court referred to this Court’s view on the absence of the element of general public importance in contractual relationships when it declined to certify the matter in ***Hermanus Phillipus Steyn vs Giovanni Gnechi-Ruscone [2013] eKLR***, when it stated thus:-

“It is clear that the matters which arose for determination both in the High Court and in this Court were substantially matters of fact. Both the High Court and this Court made concurrent findings of fact on the evidentiary matters in controversy. In our view there is no element of general public importance involved in the contract or arising from the relationship of the parties. This was a case where the appellant engaged the respondent as his agent to seek and negotiate compensation for the appellant’s nationalized properties at an agreed commission. The main issue at the trial and in the appeal was whether or not the agent had earned his commission. The two courts made a finding that the respondent had indeed earned his commission.”

In the same case, whilst addressing the question of whether the issue to be determined could be one that transcends the circumstances of the case, the Supreme Court continued:-

“In making the application for certification, Mr. Nyaoga further argues that this case involves matters of general public importance to all business people in Kenya, including all agents and investors who should know what criterion is for the determination of the quantum of an award of damages for breach of a commission contract brokerage on a stated price. It is our opinion however, with respect, that Counsel is treading a journey of legal innovation so as to clothe a private –agency contract with ingredients of public interest. The nature of the commission agreement in the instant case and the dispute arising therefrom cannot affect all business people in Kenya including all agents and investors.”

Given the circumstances of this case, we cannot find any element of a general public importance in the appeal sought. The applicant’s claim for special damages is derived from a commission contract strictly between himself and the respondent, and there is no benefit to be derived by the general public or even insurance commission agents in Kenya from this dispute or the appeal sought to be filed. The only beneficiary would be the applicant herein. In his own words he stated that, he would wish to extend time to file the appeal ***“...so that he can receive his benefits.”***

To conclude, we consider it appropriate to end with an excerpt of the Supreme Court from the case of ***Peter Odour Ngoge vs Francis Ole Kaparo [2012] eKLR***, where it was stated,

“In the interpretation of any law touching on the Supreme Court appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up running up to the Court of Appeal, have the professional competence, and proper safety design, to resolve all matters touching on the technical complexity of the law; and only cardinal issues of law or jurisprudential moment, will deserve the input of the Supreme Court.”

We agree. Accordingly, we consider that the application before us does not meet the threshold as stipulated by **Article 163 (4) (b)** of **the Constitution** so as to justify certification that the intended appeal involves a matter of general public interest and behooving a determination by the Supreme Court. The application be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 13th day of FEBRUARY, 2015.

J.W. MWERA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

